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Supreme Court, U.S.
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No. 02-299

In The

Supreme Court of the United States

ENTERGY LOUISIANA, INC.,

Petitioner,

v.

LOUISIANA PUBLIC SERVICE COMMISSION, *et al.*,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Louisiana

SUPPLEMENTAL BRIEF

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ARGUMENT

In arguing that only the Federal Energy Regulatory Commission ("FERC") may decide whether a party has been overcharged under a contract filed with the FERC, the United States at least edges closer than petitioner, Entergy Louisiana, Inc. ("ELI"), to acknowledging that this case involves compliance with a contract filed at the FERC rather than FERC ratemaking. At the same time, the United States advocates that this Court create a new regime of exclusive FERC jurisdiction for electric contract disputes, in which buyers must pay first and sue at the FERC in the hope of someday redressing their grievances. Further, the United States advocates inverting the intent behind the Federal Power Act, to prevent states from deciding straightforward overcharge cases in which holding companies misallocate costs in furtherance of corporate objectives. These arguments conflict with the Court's precedents and provide no valid basis for review of this case.

Although its argument is adorned with cases relating to the exclusive *ratemaking* power of the FERC, the United States concedes that this case is about contract *enforcement*. [U.S. Br. at 11, 12]. Essentially, the United States attempts to extend ratemaking precedents to contract enforcement. Since issues that could have been decided by the FERC in fixing just and reasonable rates are preemptively determined when the FERC sets a rate, the United States argues that the courts and regulatory agencies are barred from deciding all *enforcement* issues that could be decided by the FERC. [U.S. Br. at 10-11]. But the FERC does not have exclusive jurisdiction over contract enforcement.

The United States also contends, without substantive explanation, that this case may affect the FERC's ability to promote regional transmission organizations. Apparently the United States perceives a threat to the FERC's authority from requiring utilities to comply, promptly, with FERC tariffs. But even if this paradoxical threat could arise, the United States does not explain how this case could threaten a scheme of transmission regulation. Thus,

the contention provides no sound reason for granting certiorari.

1. Breach of the System Agreement.

There can be no reasonable dispute that this case involves a facial breach of the System Agreement. The FERC enacted a tariff that required a process – the consideration of specific criteria and the documentation of the reasons for each decision – before a mothballed unit could be considered "available" to meet System needs. Having breached the "clear and unambiguous" terms of its previous tariff without penalty, Entergy proceeded to disregard the terms of its new tariff. [Pet. App. at 124a, 151a-152a (breach of prior tariff)]. Entergy's Operating Committee was supposed to document its intent to return the units to service "at a future date," but had no plan to return any at a specific future date. [Pet. App. 104a; Resp. App. A]. It was supposed to consider "the projected length of time the unit would be in ERS status," but obtained no projection of this length of time. [Pet. App. 104a; Resp. App. A]. It was supposed to consider "the projected cost of maintaining such unit," but considered no projection of that cost. [Pet. App. 104a; Resp. App. A]. It was supposed to consider the "projected cost of returning the unit to service," but obtained only incomplete and outdated information set forth in a bar chart on that point. [Pet. App. 104a; Resp. App. A]. As an administrative law judge found, "[t]he Operating Committee did not even seek the information necessary to reach a well-considered decision." [Pet. App. at 74a].

Both Entergy and the United States avoid addressing the finding of a contractual breach, with good reason. Entergy billed ELI for units in extended reserve shutdown ("ERS") without satisfying the preconditions established by a contract amendment approved by the FERC. This determination is not complex, does not require regulatory expertise, and would be apparent to any customer upon the slightest review of the Operating Committee's minutes. Yet the United States would have this Court hold

that the Federal Power Act was intended to require that this facial overcharge be imposed on retail ratepayers.

2. Alleged preemptive effect of contract violation.

Although it employs language suggesting that Entergy's actions were authorized under the contract amendment, the United States intermittently faces up to the real issue – whether a contract *violation* should be given preemptive effect. [*Compare* U.S. Br. at 10 *with* U.S. Br. at 11, 15 n.2]. The United States argues that "FERC . . . is exclusively empowered to sanction violations of the System Agreement's provisions." [U.S. Br. at 11]. Further, the United States concedes the implications of its position: "Respondents assert (Br. in Opp. 19) that petitioner's position in this case 'would require state officials to accept an illegal charge' until it is disallowed by the FERC. That is exactly what the filed rate doctrine provides in this context. . . . " [*Id.* at 15 n.2].

Accepting this principle would indeed create a "bright line," but it would be inconsistent with the intent of the Federal Power Act. A utility's facial violation of an unambiguous contract would by law receive presumptive correctness and preemptive effect. Aggrieved parties would be required to seek relief only at the FERC, where even the pendency of this case has not provoked the agency to decide the Louisiana Commission's interruptible load complaint, filed nearly eight years ago.

This new, utility-empowering "bright line" would conflict with the purpose of the Federal Power Act. This Court has recognized that the Act was intended to supplement and aid state regulation, not supersede it. *Connecticut Light & Power Co. v. Federal Power Comm'n*, 324 U.S. 515, 526, 530-31, 65 S. Ct. 749, 754, 756 (1945). This Court also has held that the virtually identical Natural Gas Act "had no purpose or effect to cut down state power." On the contrary, "perhaps its primary purpose was to aid in making state regulation effective." *Panhandle Eastern Pipe Line Co. v. Public Service Comm'n of Indiana*, 332 U.S. 507,

517, 68 S. Ct. 190, 195 (1947). The Court has recognized that "[t]he regulation of utilities is one of the most important of the functions traditionally associated with the police powers of the States." *Arkansas Elec. Coop. Corp. v. Arkansas Public Service Comm'n,* 461 U.S. 375, 377, 103 S. Ct. 1905, 1908 (1983). To hold that a state agency cannot determine the consequences of a facial breach of objective contractual requirements would not be consistent with these holdings.

3. Precedents establishing that the filed rate doctrine does not vest exclusive contract enforcement jurisdiction in federal agencies.

The United States has no substantive answer to the precedents establishing that state and federal courts have jurisdiction to enforce the terms of tariffs filed with federal regulatory agencies. Thus, the United States dismisses the decisions as "distinguishable" because they were decided "under other statutory schemes,"-just as ELI claims the "statutory schemes are . . . different." [U.S. Br. at 15 n.2; ELI Reply Br. at 6]. Paradoxically, ELI distinguishes *Great Northern Railway Co. v. Merchants Elevator Co.*, 259 U.S. 285, 42 S. Ct. 477 (1922), a case recognizing *state court* jurisdiction to enforce a tariff filed with the Interstate Commerce Commission, on the theory that the ICA allows parties to enforce contracts in *federal* court. [ELI Reply Br. at 6]. That distinction does not explain the Court's recognition of state court jurisdiction. For its part, the United States offers no "difference" in the statutory schemes, other than a vague reference to a "bright line," that would require a departure here from the precedents. [U.S. Br. at 15 n.2].

Most important, this Court *has decided* the exclusivity issue under the Natural Gas Act, a parallel "statutory scheme" that is virtually identical to the Federal Power Act and empowers the same regulatory agency. In *Pan American Petroleum Corp. v. Superior Court of Del.*, 366 U.S. 656, 81 S. Ct. 1303 (1961), this Court held that a state court may hear a claim that a customer was overcharged under a contract for

the sale of natural gas that was filed with the FERC's predecessor, the Federal Power Commission ("FPC"). In that case, a Kansas agency mandated minimum prices to be paid for gas produced in Kansas, in excess of contract rates filed with the FPC. The state order mandating the minimum prices was overturned in this Court, and the customer sued in state court to recover the excess charges. The gas producers argued that the suit sought to enforce a federal tariff and could only be brought at the FPC, but the Court rejected that argument. The Court held:

> Petitioners contend that to permit the state courts to entertain the suits brought by Cities Service will jeopardize the uniform system of regulation that Congress established through the Natural Gas Act. Apart from other considerations that dispel such fears, it should be remembered that the route to review by this Court is open to parties aggrieved by adverse state-court decisions of federal questions. . . .

Id. at 665, 81 S. Ct. at 1308-09. The Court also made it clear that *Merchants Elevator*, decided under a different statutory scheme, *does apply* to cases enforcing contracts filed with the FERC. *Id.*, 81 S. Ct. at 1309. The Court concluded: "We hold that the state courts of Delaware do have jurisdiction to hear and decide the claims that Cities Services has formulated." *Id.* at 666, 81 S. Ct. at 1309.

As this Court recognized in *Pan American*, the suit presented a contract claim, subject to the jurisdiction of the state court. Since the suit did not seek to alter the terms of the contract, it did not fall within the exclusive jurisdiction of the FPC. *Id.* at 662-63, 81 S. Ct. at 1307. A similar result was reached by the United States Court of Appeals for the Eighth Circuit in *Pan American Petroleum Corp. v. Kansas-Nebraska Natural Gas Co., Inc.*, 297 F.2d 561, 567, *cert. denied*, 370 U.S. 937, 82 S. Ct. 1581 (1962).

In *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 101 S. Ct. 2925 (1981), this Court recognized that the Federal Power Act and the Natural Gas Act are substantially identical and referred to the "established practice of citing

interchangeably decisions interpreting the pertinent sections of the two statutes." *Id.* at 578 n.7, 101 S. Ct. at 2930 n.7. Thus, *Pan American* and other cases interpreting relevant portions of the Natural Gas Act apply here.

Additionally, the major difference between the natural gas and power acts and other statutory schemes cuts against any need for a single enforcement forum. Unlike other schemes, there was no intent to require uniformity of contracts filed with the FERC. *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 338-39, 76 S. Ct. 373, 378 (1956). The Interstate Commerce Act was enacted to ensure uniform shipping charges, but the Natural Gas Act and Federal Power Act permit parties to negotiate the terms of contracts. The contracts are binding unless altered after review by the FERC. Thus, enforcement actions have their basis in state contract law, not federal law. *Pan American Petroleum Corp. v. Superior Court of Del.*, 366 U.S. 656, 662-63, 81 S. Ct. 1303, 1307 (1961).

Given that background, not mentioned by the United States, the vague reference to "other statutory schemes" is an incomplete and unavailing distinction.

4. Ratemaking versus contract enforcement.

The United States relies most heavily on an asserted parallel between this case and *Mississippi Power & Light Co. v. Mississippi ex rel. Moore*, 487 U.S. 354, 108 S. Ct. 2428 (1988). The United States asserts that *Mississippi Power* stands for the proposition that the FERC's preemptive power precludes state consideration of prudence issues even when they are not explicitly decided in a FERC proceeding. [U.S. Br. at 11-12.] But that principle applies to issues necessarily implicit in *making the rate*, not to issues that might arise in a contract enforcement action or a prudence case involving a utility's failure to comply with its contract.

In *Mississippi Power*, the Court determined that a state agency could not disallow costs as imprudent that were included in a tariff approved by the FERC, even if the prudence issue was not actually litigated at the FERC. That decision is imminently reasonable, because a determination

that rates are "just and reasonable" necessarily means the costs included in the rate are reasonable. Any claim that the costs are imprudent would have to be raised at the FERC, which has exclusive jurisdiction to alter or approve the rate. But that principle cannot be extended to enforcement of the contract's provisions after the FERC has accepted or approved them. In that situation, any court or agency with jurisdiction may decide the case so long as the doctrine of "primary jurisdiction" does not require deferring to the FERC. The United States makes no claim that the doctrine applies here, where the violation is straightforward.

In *Arkansas Louisiana Gas Co. v. Hall*, 453 U.S. 571, 101 S. Ct. 2925 (1981), this Court recognized the difference between contract enforcement and ratemaking. In that case, a natural gas seller brought an action in state court to enforce a favored nations clause in a gas sales contract that gave the seller the right to collect the highest gas price paid by the buyer to any supplier. The seller, which had been receiving for years the original negotiated rate that was on file with the FERC, brought suit when it discovered that the buyer had been paying more to another supplier. The Louisiana Supreme Court awarded damages to the seller in the amount of the difference between the FERC-filed rate and the higher rate paid to the alternate supplier. This Court held that the Louisiana Supreme Court was the appropriate authority to interpret the natural gas contract, but that the filed-rate doctrine precluded the state court from awarding damages based on a rate different from that filed with the FERC. *Id.* at 584-85, 101 S. Ct. at 2934. The Court thus affirmed the Louisiana Supreme Court's interpretation of the contract and all other aspects of its ruling except the damage award, to the extent it conflicted with the FERC-filed rate. *Id.*

In holding that the state court has the authority to interpret and enforce the contract, this Court specifically recognized the validity of the principle enunciated in *Pan American Petroleum Corp. v. Superior Court of Del.*, 366 U.S. 656, 81 S. Ct. 1303 (1961). This Court said that *Pan American* stands for the proposition "that a state rather

than a federal court was the proper forum in which a buyer should bring a breach-of-contract action to obtain a refund of charges in *excess* of the filed rate. Permitting that action in no way contravened the filed rate doctrine; in fact, it furthered the doctrine's purpose." *Id.* at 582 n.12, 101 S. Ct. at 2933 n.12 (emphasis in original).

5. Asserted delegation of preemptive power.

In this case, Entergy made a choice not to comply with its own contract for wholesale sales. The choice was not mandated by, and indeed conflicts with, the contract approved by the FERC. The United States would have this Court rule that such utility choices have preemptive effect, subject to correction only by the FERC. This delegation of preemptive power to utilities is not authorized by the Federal Power Act and could hardly be inferred from a statute originally enacted to constrain utility conduct. *See Enron Power Marketing, Inc. v. F.E.R.C.*, 296 F.3d 1148, 1153 (D.C. Cir. 2002) ("Petitioners have offered no support for the proposition that Congress ever has or even could delegate authority to a federal agency which would then be able to essentially redelegate that authority by deferring to a private body associated with the industry which Congress had commissioned it to regulate.")

Although payments and receipts among the Entergy operating companies under the System Agreement cancel each other out from the parent's perspective, the payments and receipts have profit consequences for Entergy when considered in the context of retail rates. If a holding company has a retail "rate freeze" or "stay-out" in one jurisdiction and ongoing, annual cost of service reviews in another, it has a strong incentive to allocate costs to the jurisdiction with ongoing rate reviews. The costs may be recovered in that jurisdiction, while lower costs produce excess profits in the jurisdiction with the rate freeze. *See generally Louisiana Public Serv. Comm'n v. F.E.R.C.*, 174 F.3d 218, 229-30 (D.C. Cir. 1999). Thus, Entergy may have an incentive to manipulate payments under its System

Agreement, and it is not an appropriate delegee of preemptive regulatory power.

6. State agency power.

If courts can decide that natural gas and power contracts were violated, so can state agencies. In this case, the Louisiana Public Service Commission ("LPSC") determined that Entergy violated an unambiguous provision requiring the System to fulfill certain conditions before billing the costs of ERS units to ELI. Because ELI imprudently accepted excess costs that were assessed illegally, the LPSC refused to require retail ratepayers to pay the costs. This decision falls squarely within the LPSC's exclusive power to ensure that retail rates are reasonable. If ELI were interested in uniformity, it would have appealed the contract ruling and sought review in this Court, but it did not. The United States, for its part, offers not a hint of an argument that the contract permitted Entergy's excess assessment. The contract violation thus forms the fact premise under which this case should be decided. And it cannot have been the intent of Congress in enacting the Federal Power Act to require retail ratepayers to pay illegal overcharges up front, only to endure years of litigation seeking redress at the FERC.

7. Inapplicability of "trapping" analysis.

The United States argues that the LPSC's decision illegally "traps" costs in a manner forbidden by the preemption doctrine. [U.S. Br. at 14-17]. But the disallowance of costs for utility imprudence is not the type of "trapping" that offends federal law. Utilities frequently misallocate costs for ratemaking and regulatory agencies often disallow the excess charges. When a utility bears this cost because of its own misconduct, the costs are not "trapped" in an unlawful manner.

The "trapping" analysis of the United States would turn the preemption doctrine inside out. State agencies would be required to give preemptive effect to overcharges

assessed in violation of contracts filed at the FERC. Congress could not have intended that result in enacting the Federal Power Act.

8. Alleged importance of case.

In seeking to transform this small, nonrecurring retail issue into a matter worthy of the Court's consideration, the United States refers vaguely to the FERC's current effort to create giant Regional Transmission Organizations, run by independent operators, to manage the nation's transmission system. [U.S. Br. at 17-18]. But this case does not involve a transmission service, tariff or charge; it involves an unauthorized charge for the costs of mothballed generators that were constructed half a century ago. Moreover, the United States does not explain how its proposed "pay an illegal charge first and join the FERC relief line" rule would promote compliance with regional transmission tariffs.

As independent operators, merchants and utilities enter the new power "market," contract disputes are inevitable. Denying access to the courts to resolve these controversies and requiring the resolution of disputes at the FERC would deny justice through delay and unduly burden the agency. No valid federal purpose would be promoted by enacting this requirement.

Respectfully submitted,

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